

Message Text

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FM SECSTATE WASHDC

TO AMEMBASSY NAIROBI IMMEDIATE

C O N F I D E N T I A L STATE 137708

E.O. 11652:GDS

TAGS:MASS, KE, US

SUBJECT:KENYA PROGRAM: FMS CREDITS

REFERENCE: NAIROBI 4821

1. IT IS UNDERSTANDABLE THAT GOK AUTHORITIES HAVE A SOME-WHAT DIFFERENT INTERPRETATION OF THE LEGAL OPINION AND THE PROMISSORY NOTE THAN WAS INTENDED SINCE THEY HAVE NOT HAD ACCESS TO ALL DOCUMENTS INVOLVED IN SIGNING AN FFB LOAN. FIVE DOCUMENTS ARE REQUIRED. THESE ARE: THE LOAN AGREEMENT, THE PROMISSORY NOTE, THE LEGAL OPINION OF THE BORROWER, THE GUARANTY OF THE LOAN BY THE U.S. DEPARTMENT OF DEFENSE, AND THE LEGAL OPINION OF THE GUARANTOR. FYI. AMBASSADOR MARSHAL LEFT WASHINGTON JUNE 11 HANDCARRYING COMPLETE SET OF DOCUMENTS; EXCEPT GUARANTY AND LEGAL OPINION OF GUARANTOR, WHICH WILL BE HANDLED DIRECTLY BETWEEN DOD AND TREASURER.

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2. THE FFB LOAN AGREEMENT AND THE PROMISSORY NOTE COMPLEMENT EACH OTHER AND MUST BE READ TOGETHER IN ORDER TO HAVE ALL CONDITIONS OF THE LOAN, E.G., THE PROMISSORY NOTE

RATHER THAN THE LOAN AGREEMENT PROVIDES BOTH THE INTEREST RATE AND THE PRINCIPAL REPAYMENT SCHEDULE. IN ESSENCE, THEY FORM A SINGLE DOCUMENT. ALSO, THERE IS ONLY ONE PROMISSORY NOTE FOR THE ENTIRE AMOUNT OF THE LOAN RATHER THAN SEPARATE NOTES FOR EACH DISBURSEMENT. THE PROMISSORY NOTE TEXT PROPOSED BY THE GOK OMITS MANY OF THE ESSENTIAL PROVISIONS OF THE FFB STANDARD FORM AND WHICH ARE NECESSARY TO COMPLETE THE LOAN.

3. THE USG RELIES UPON THE LEGAL OPINION, AS PROVIDED BY THE RESPONSIBLE AND COMPETENT LEGAL ADVISER OF THE BORROWER, AS A CERTIFICATION OF THE BORROWER'S AUTHORITY TO ENTER INTO THE LOAN AGREEMENT AND TO PERFORM AS CONTRACTED. IT IS ONLY PRUDENT AND A STANDARD PRACTICE FOR THE USG TO ASK FOR AN ACKNOWLEDGEMENT FROM THE BORROWER THAT HE RECOGNIZES CERTAIN CONDITIONS OF THE BORROWING, THAT THE BORROWER'S LAWS PERMIT SUCH A BORROWING, AND THAT HE ACCEPTS THOSE CONDITIONS. THAT IS THE PURPOSE OF CLAUSES 1, 2, 3, 6, AND 7 OF THE LEGAL OPINION. CLAUSES 4 AND 5 ARE STATEMENTS OF DELEGATION OF AUTHORITY TO A GOK OFFICIAL(S) TO SIGN ON THE BEHALF OF THE BORROWER.

4. THE PROPOSED KENYAN TEXT OF THE LEGAL OPINION IS IN ESSENCE A STATEMENT OF DELEGATION OF AUTHORITY TO A PARTICULAR KENYAN OFFICIAL TO SIGN ON BEHALF OF THE GOK. THAT AUTHORITY SHOULD BE PROVIDED TO THEIR CHARGE IN WASHINGTON NOW SO THAT HE WILL HAVE AUTHORITY TO SIGN THE LOAN DOCUMENT AND PROMISSORY NOTE BY JUNE 30. HOWEVER, IT WOULD NOT REPLACE THE NEED FOR A LEGAL OPINION IN THE FORM ALREADY PROVIDED AND WHICH MUST BE RECEIVED PRIOR TO THE FIRST DISBURSEMENT OF FUNDS BY THE FFB.

5. REFERENCED CABLE STATES THAT THE STANDARDIZED LEGAL OPINION OF THE TEXT PREJUDGES THE SUBSTANCE OF THE LOAN CONFIDENTIAL

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DOCUMENTS TO BE SIGNED. THIS OBJECTION PROBABLY INDICATES A MISUNDERSTANDING OF FFB LOAN PROCEDURES. THE LOAN DOCUMENTS ARE NOT OPEN FOR NEGOTIATION TO ANY SUBSTANTIVE DEGREE, BECAUSE OF THE PROVISIONS OF THE FEDERAL FINANCING BANK ACT OF 1973, THE BANK'S POLICIES AND THE PRECEDENTS WHICH HAD ALREADY BEEN WORKED OUT IN PREVIOUS FFB LOANS.

6. IN VIEW OF SHORT TIME REMAINING IN THIS FISCAL YEAR,
RECOMMEND THE GOK AUTHORIZE THEIR EMBASSY TO ENTER INTO
DISCUSSIONS WITH U.S. TREASURY IMMEDIATELY IN ORDER TO
OBTAIN FIRST HAND EXPLANATION OF THE LOAN DOCUMENTS AND

REQUIREMENTS. IF THEY PREFER, THEY MAY USE THEIR
AUTHORIZATION FORM SO THAT ADUNDO MAY INITIATE THE
NEGOTIATIONS. THIS ALSO APPEARS SUFFICIENT FOR THE
SIGNING OF THE LOAN AGREEMENT, THE PROMISSORY NOTE AND
LETTERS REQUESTING ADVANCES AGAINST THE CREDIT. HOWEVER,
PLEASE INFORM GOK THAT BEFORE ANY DISBURSEMENTS ARE
MADE, U.S. TREASURY WILL REQUIRE A LEGAL OPINION IN THE
FORM GIVEN IN STATE 134280. KISSINGER

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